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ATTORNEY GENERAL

Ronald E. Warnicke
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State House
Phoenix, Arizona 85007

June 20, 1988
LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Re: 78-121 (R78-147)

Dear Mr. Warnicke:

This is in response to your request for our opinion regarding the legality of one person's holding two elective offices at the same time. More specifically, you asked whether Mrs. Rose Mofford could legally hold both offices of Arizona Secretary of State and director of the Central Arizona Water Conservation District (CAWCD).

There is no Arizona statute which addresses the question of holding offices simultaneously. Thus the question must be analyzed under the common law. Under the doctrine of incompatibility of public offices, the acceptance of a second office which is incompatible with the first office automatically vacates the first office. Perkins v. Manning, 59 Ariz. 60, 122 P.2d 857 (1942). In Perkins our Supreme Court announced the following rule:

The doctrine of incompatibility of offices depends upon the public policy of the state; that offices are incompatible not only when the duties thereof are in conflict, but when it is physically impossible that they may be performed properly by the same person. 59 Ariz. at 70.

A further explanation of the doctrine of incompatibility has been quoted in Op. Atty. Gen. 69-24-L:

. . . it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the

duties of both . . . Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant. 3 McQuillin, Municipal Corporations, Section 12.67 at Page 298; see Op. Atty. Gen. 70-7-L.

The directors of the CAWCD Board have the power, inter alia, to manage and conduct the affairs and business of the district, make and execute contracts, establish by-laws and employ agents and employees--all generally for the purpose of assisting with State obligations related to the Central Arizona Project. See A.R.S. §§ 45-2603 and -2612. The functions of the CAWCD Board are not inherently inconsistent with the duties imposed upon Mrs. Mofford as Secretary of State. See A.R.S. § 41-121. That is, Mrs. Mofford can faithfully and impartially discharge the duties of both offices without a resulting antagonism or contrariety.

Further, we find no prohibition against Mrs. Mofford's seeking election to office while remaining a CAWCD Board member. A.R.S. § 38-296, which places some limitation upon filing for election by the incumbent of an elective office, seems at first blush to be applicable. This section states in part:

A. No incumbent of an elective office, whether by election or appointment, shall be eligible for nomination or election to any office other than the office so held.

Both the Secretary of State (see Arizona Constitution, Article 5, Sections 1 and 13) and a CAWCD director (see A.R.S. § 45-2608) beyond cavil are offices to which a person is elected. Thus, as a director of the CAWCD, Mrs. Mofford would seem to have been an "incumbent of an elective office" at the time she was appointed Secretary of State.

However, the scope of A.R.S. § 38-296.A is limited by A.R.S. § 38-101, which confines "office(s)" to those where ". . . the salary or compensation of the incumbent or members of which is paid from a fund raised by taxation or by public revenue." See Op. Atty. Gen. 72-20-L. The elected directors of the CAWCD serve without compensation from the public treasury, receiving only reimbursement for travel and subsistence while engaged in the business of the district. See A.R.S. § 45-2609.D. The Arizona Supreme Court has indicated that the incumbent of this type of office is not -- holding an "elective" office within the meaning of § 38-296.A because:

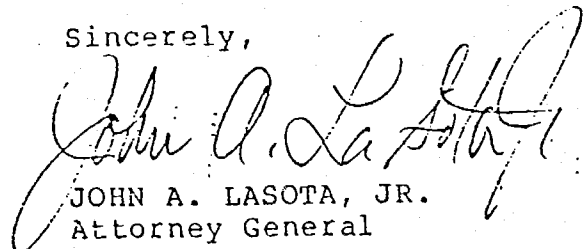
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Such an office is one of public service or trust, and it is not the type of office contemplated under the above statutes. (Referring to A.R.S. §§ 38-296.A and -101.) The distinction between an office of profit and an office of trust has long been recognized in Arizona. Shirley v. Superior Court in and for County of Apache, 109 Ariz. 510, 515, 513 P.2d 939 (1973).

In sum, Mrs. Mofford is not precluded from her present holding of two elective offices at the same time. Additionally, she is not precluded from seeking nomination to the Office of Secretary of State while she is still a director of the CAWCD. The only possible constraint on her seeking nomination to this office would arise under A.R.S. § 38-296.A, as stated above. However, because the office of director of the CAWCD is not the type of "elective office" contemplated under § 38-296.A, Mrs. Mofford is eligible for nomination and election as Secretary of State. Cf. Shirley v. Superior Court, supra (allowing an elected school trustee who does not receive compensation from the public treasury to seek nomination and election as a member of the Board of Supervisors of Apache County).

Sincerely,


JOHN A. LASOTA, JR.
Attorney General

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